No. 88-1477

Supreme Court, U.S.
FILED
MAR 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, DANIEL LITTLE AXE, GOVERNOR,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALVIN D. SHAPIRO*
LAW OFFICE OF ALVIN D. SHAPIRO
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824
Attorney for Petitioner
*Counsel of Record

Of Counsel:
KEITH WILSON, JR.
201 W. Lexington
Independence, Missouri 64050
(816) 252-1000

WILLIAM V. MCLEESE
14400 E. 42nd St.
Independence, Missouri 64050
(816) 373-8262

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

On April 18, 1865, President Andrew Johnson issued to Rev. Thomas Johnson a patent for certain land in the State of Kansas. Rev. Johnson had been shot to death some 3-1/2 months previously. Under common law, the patent to a dead man was clearly void. It could only be saved by a statute, 43 U.S.C. § 1152, since repealed. The statute required that the land in question be "public lands". Because such land had been the subject of provisions in an 1854 treaty with the Shawnees, the Court of Appeals construed such treaty and concluded the patent was for "public lands", subject to sale "under general laws".

The following questions are presented:

1. Does this case present the issue posed by Chief Justice Rehnquist in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) at 601, fns. 23 and 24, as to whether this could be deemed "public lands" solely because naked fee title might have been held by the United States subject to preceding rights?

2. Will the Court enforce its frequently-stated rules as to construing ambiguities in Indian treaties in favor of the Indians' rights, or will it allow such rules to be ignored?

3. Do this Court's decisions in at least four cases require a finding that the United States only held title as either trustee for the Shawnees or to perform the ministerial act of conveyance, and the tract was therefore *not* "public land"?

4. Under former 43 U.S.C. § 1152 (now repealed, but still affecting many titles), what are "public lands", as used in that statute?

TABLE OF CONTENTS

Questions Presented I
Table of Authorities III
Petition for Writ of Certiorari 1
Opinions Below 1
Jurisdiction 2
Statutory Provisions Involved 2
Statement 3
Reasons for Granting the Petition 6

1. The issue defined—but not ruled on—by Chief Justice Rehnquist in *Rosebud Sioux Tribe v. Kneip* is now presented to the Court 6

2. The Court should require that more than mere lip service be paid to its oft-stated rule that in construing Indian treaties, all ambiguities are to be construed in favor of the Indians' rights 7

3. The Court should consider whether four of its previous decisions have been ignored and not followed in this case 10

4. The Court should construe former 43 U.S.C. § 1152, now repealed, so as to define what are "public lands", in that many titles may still be affected 12

Conclusion 14

Appendix—

A. Opinion, U.S. Court of Appeals for the Tenth Circuit, December 2, 1988 ..... A1
B. Petition for Rehearing and Suggestions for Rehearing En Banc, filed December 15, 1988 ..A18
C. Order Overruling Petition for Rehearing, December 23, 1988 .....A33

TABLE OF AUTHORITIES

Cases

Absentee Shawnee Tribe of Indians v. U.S., 6 I.C.C. Dec. 377 (1958) 3, 11
Ash Sheep Company v. U.S., 252 U.S. 159 (1919) ..6, 7, 10
Minnesota v. Hitchcock, 185 U.S. 373 (1901) 6, 10
Oneida (County of) v. Oneida Indian Nation, 470 U.S. 226 (1985) 8
Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 6, 7, 8, 9, 10
Seymour v. Superintendent, 368 U.S. 351 (1962) 10
Solem v. Bartlett, 465 U.S. 463 (1984) 10
U.S. v. Shoshone Tribe, 304 U.S. 111 (1938) 9, 10, 11

Statutes

28 U.S.C. § 1254(1) 2
43 U.S.C. § 1152 (repealed by P.L. 94-579) 2, 5, 12

Treaties

Treaty with the Shawnees, 10 Stat. 1053 (1854) 3, 4, 8, 9, 11, 13

No.

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, DANIEL LITTLE AXE, GOVERNOR,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Absentee Shawnee Tribe of Indians (hereinafter "Shawnees"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, A1-17) is reported at 862 F.2d 1415. The opinion of the trial court is reported at 628 F. Supp. 1112.

JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1988. A timely petition for rehearing was denied on December 23, 1988 (App., *infra*, A33). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Former 43 U.S.C. § 1152 (repealed in 1976) states:

> Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who has died before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

STATEMENT

Until the Court of Appeals' decision cited and relied on several questionable "facts", it had been believed by the parties and by the district court that the relevant facts were undisputed. Such undisputed facts are:

Petitioner sought title to 11.97 acres of land, currently a state park in Johnson County, Kansas. This acreage was originally contained in 200,000 acres of land ceded by the United States to the Shawnees pursuant to an 1854 treaty, 10 Stat. 1053. In April, 1865, President Andrew Johnson executed a patent as to the subject tract in favor of Rev. Thomas Johnson who was dead. From this land patent, respondent traces its title. Petitioner contends this 1865 conveyance to a dead man is void.

The land in question was originally part of 200,000 acres ceded to the Shawnees in 1854. The United States, pursuant to treaty in 1817, had pushed the Shawnees west of the Kansas-Missouri border, ceding them 1.6 million acres. Within 30 years, the U.S. was "negotiating" with the Shawnees to cede the ~~1.6~~ million acres back to it. In exchange, pursuant to treaty in 1854,* the U.S. ceded back 200,000 of the 1.6 million acres. The land given to the Shawnees ran west from the Kansas-Missouri border.

Article 2 of the treaty states that from such 200,000 acres, three (3) sections of land "shall be first set apart . . . to the Missionary Society of the Methodist Episcopal Church South", for an Indian school. But, it states, "all

---

*A major aspect of the 1854 treaty—monetary consideration—was ruled by the Indian Claims Commission to have been "unconscionable", 6 I.C.C. Dec. 377, at 394 (1958).

the land . . . set apart" to the Methodists "shall be considered as part of the 200,000 acres reserved by the Shawnees."

Article 6 sets forth certain conditions and agreements which the Methodists undertake, upon performance and completion of which, the President of the United States is authorized to issue to them a patent for the land. So that the President may perform such act, Article 2 provides the Shawnees "cede, relinquish and convey to the United States" those tracts or parcels which "may be sold, or are required to be sold" pursuant to the treaty provisions.

By 1861, the Methodists had purportedly designated all three sections of land so set apart as having been sold to Rev. Thomas Johnson. Rev. Johnson was murdered on January 2, 1865. At the time of his death, the school had been closed for some years. In violation of Article 2, the three sections of land were not being used to educate and benefit the Shawnees.** However, on April 18, 1865, about three days after the death of President Lincoln, the new President, Andrew Johnson, approved and signed a land patent to Rev. Johnson.

Rev. Johnson's heirs took the land and profited from it to the exclusion of the Shawnees.

The land patent was filed May 26, 1865. From 1836 to 1976, a statute was in effect which provided:

**All parties believed the issue was whether or not the patent was "void" (as it undoubtedly was under common law), and not whether it was "voidable". Any issue of fact as to whether the Methodists actually performed was not deemed relevant. However, in its opinion, the Court of Appeals cites and appears to rely on certain "facts" (entirely in error) that the Methodists did perform, App. A17; 862 F.2d 1415, at 1422, fn. 7.

> Where patents for public lands have been or may be issued in pursuance of any law of the United States to a person who has died before the date of such patent, the title to land designated therein shall inure to and become vested in the heirs, devisees, and assignees of such deceased patentee as if the patent had issued to the deceased person during life.

43 U.S.C. § 1152, repealed by P.L. 94-579.

This suit to quiet title was filed by petitioner November 5, 1984, in the U.S. District Court for the District of Kansas. The complaint recited the above facts and said the 1865 patent to Rev. Johnson was void on its face; beneficial title to the land remained vested in petitioner. It sought a decree that fee simple title to the 11.97 acres, included in the land described in the patent, was in petitioner. The respondent State of Kansas claimed the otherwise invalid land patent issued to a dead man was valid because of former 43 U.S.C. § 1152. It said such repealed statute "saved" the otherwise invalid conveyance. All parties—and both district court and Court of Appeals—agree that under common law the patent to a dead man is void. The Shawnees said former 43 U.S.C. § 1152 was not applicable because, by its terms, it applied only to "public lands". This is not public land. The Court of Appeals held the land in question was "public lands", subject to sale "under general laws", thus saving the otherwise void conveyance.

The Court of Appeals' opinion presents several issues that need to be addressed by this Court.

REASONS FOR GRANTING THE PETITION

1. The issue defined—but not ruled on—by Chief Justice Rehnquist in Rosebud Sioux Tribe v. Kneip is now presented to the Court.

In *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), Chief Justice Rehnquist, writing for the Court, defined the issue there ruled on, 430 U.S. at 601, fns. 23 and 24. He did so in response to the *amicus* brief filed by the United States in support of the Sioux. He said in cases such as *Minnesota v. Hitchcock*, 185 U.S. 373 (1901), and *Ash Sheep Co. v. U.S.*, 252 U.S. 159 (1919) (see discussion in No. 4, *infra*), lands admittedly "ceded" by the Indians were precluded from becoming "public lands" because a trust imposed upon them had given them a preceding status. He noted the U.S. Court of Appeals for the Eighth Circuit had indicated in *Rosebud* that retaining a beneficial interest did not necessarily erode such cession. He then stated the question of whether the *Rosebud* lands become "public lands" under *Hitchcock* and *Ash Sheep* was not there before the Supreme Court and did not there need to be ruled upon. The Solicitor General's office had filed an *amicus* brief in support of the Sioux seeking to have such issue ruled in their favor.

This case presents that very question: Was the reservation of a beneficial interest to and by the Shawnees eroded by their cession of naked title to the United States, so as to require a ruling that the tract then became "public lands"?

Chief Justice Rehnquist indicates he had made this statement in response to the United States, as *amicus curiae* in support of the Sioux. The Solicitor General

had apparently argued, as the Shawnees do here, that conveyance of naked title to the government, as trustee or for performance of the ministerial act of conveyance, does *not* make these lands "public lands". The Chief Justice was explaining why that issue was not there before the Court.

But this case presents that question for which the United States had filed its *amicus* brief in *Rosebud* in support of the Indians, and which the Chief Justice explained was *not* reached in *Rosebud*. Here, *Ash Sheep* would require a finding that reservation of a beneficial interest, with naked title in the United States, prevented any finding this was "public lands", despite a cession of title.

The issue is here before the Court. The United States has previously supported the Sioux on this very issue. The Court should here rule on this issue which at that time the Solicitor General had sought a ruling in *Rosebud*.

2. The Court should require that more than mere lip service be paid to its oft-stated rule that in construing Indian treaties, all ambiguities are to be construed in favor of the Indians' rights.

This Court, from Chief Justice Marshall to the present, has invariably directed lower courts, in construing ambiguities that may exist in treaties and legislation involving Indian rights, to use liberal construction in favor of the Indians' rights. This Court frequently states this benign principle is based, if nothing else, on recognition of the trust relationship which arises from the treatment and advantage taken of basically defenseless, outnumbered, illiterate Indians, untrained in the white man's

law. In *Oneida (County of) v. Oneida Indian Nation,* 470 U.S. 226 (1985), Justice Powell stated:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, Choctaw Nation v. United States, 318 U.S. 423, 431-432 (1943); Choate v. Trapp, 224 U.S. 665, 675 (1912), with ambiguous provisions interpreted to their benefit, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Winters v. United States, 207 U.S. 564, 576-577 (1908). "Absent explicit statutory language", Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 690 (1979), this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. Menominee Tribe v. United States, 391 U.S. 404 (1968).

470 U.S. at 247.

Here, the Court of Appeals made its obligatory obeisance to this rule of construction and then promptly—and demonstrably—proceeded to flout it (see below). This case presents the Court with the opportunity to enforce such rule, not only by applying it to this case, but to forcefully re-assert its continued validity.

The Court of Appeals paid lip service only to this rule. It demonstrably used all available devices to construe this 1854 treaty (the major aspect of which had been described by the Indian Claims Commission as "unconscionable") against the Shawnees' rights.

One example will suffice: The Court of Appeals conceded the key provision in issue (Art. 2) expressly

states in plain language this very land is "reserved" by the Shawnees, as part of its 200,000 acres, App. A11. However, the Court states such express term is "highly suspect" because the first use of "reserved" in Art. 2 (but *not* this use) had been amended to "cede". How or why such amendment of the first use makes this second key use of "reserved" "highly suspect" is not explained. That it may be "highly suspect" does not justify ignoring it.

It is also indicated the Court of Appeals will not construe "reserved" in its "technical sense," *ibid.* Again, this is left unexplained. Why is this thrown in? Then, in justifying its rejection of this express term (*i.e.*, "reserved") so as to also justify its conclusion that "the United States was not the agent of the Indians," it omits to state that Art. 6 (quoted at App. A9), expressly provides the President of the United States is indeed both trustee and agent of the Shawnees.

Finally, as if to leave no doubt that its lip service to the *Oneida* principle of construction is indeed just lip service, the Court of Appeals dredges up, to disprove whatever it wishes to disprove about "reserved", a letter dated January 17, 1865, demonstrably irrelevant and patently unreliable to even the most casual observer App. A13-14. It cites this letter, written some ten years later, supposedly by the Shawnees who applied "x's" to it, to show their "intent".

At best, the provisions of Art. 2 ("cede", "set apart", "reserved") create an ambiguity. If so, this Court's oft-repeated rule, cited in *Oneida, supra,* leaves no doubt as to a lower court's duty to construe or interpret any such ambiguity in favor of the Indians' rights. See also *U.S. v. Shoshone Tribe,* 304 U.S. 111, 116-7 (1938).

3. The Court should consider whether four of its previous decisions have been ignored and not followed in this case.

We note in 1., *supra,* that the Solicitor General had, on behalf of the United States, entered an appearance as *amicus* to support the Sioux Indians in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977). The Solicitor General had done so, we learn from Chief Justice Rehnquist, 430 U.S. at 601, fns. 23 and 24, because it was believed two Supreme Court cases so clearly required a decision for the Sioux, *Ash Sheep Co. v. U.S.,* 252 U.S. 159 (1919) and *Minnesota v. Hitchcock,* 185 U.S. 373 (1901). As described in 1., Chief Justice Rehnquist pointed out *Rosebud* did not reach the *Ash Sheep* issue. It is also submitted in 1., that here the issue described by the Chief Justice is squarely presented, and *Ash Sheep* and *Hitchcock* are directly in point.

Yet, although the Court of Appeals refers to *Ash Sheep* (App. A16), it refuses to follow it and at least three other cases which are similar to *Ash Sheep,* which all rule that the fact that the Indians have ceded title to the United States, either as trustee or to perform the ministerial act of conveying title, does not result in any tracts being converted into "public lands" or serve to diminish the Indians' rights. Those other cases, along with *Ash Sheep,* are *Minnesota v. Hitchcock, supra, Seymour v. Superintendent,* 368 U.S. 351 (1962); and *Solem v. Bartlett,* 465 U.S. 463 (1984). See also *U.S. v. Shoshone Tribe,* 304 U.S. 111, 116-7 (1938). All four cases recognize there is no diminishment of Indian title from or by the government holding title, as here, so as to perform the ministerial or trust act of conveying title. ("Grants of land subject to the Indian title by the United States, which had

only the naked fee, would transfer no beneficial interest". *U.S. v. Shoshone Tribe*, 304 U.S. at 116).

It is true the Court of Appeals attempted to distinguish these cases by saying they involved Congressional enactments, rather than a treaty, as here. Somewhat theoretically, the Court of Appeals says that in cases involving Congressional acts, the Indians presumably bring no influence to bear, while in respect to treaties, the Indians are a party and their intent is to be examined in construing the treaty's provisions, App. A7, 13-14. Such conceits are grossly inappropriate when applied to this 1854 treaty: (a) Each of the Shawnees shown as assenting to the treaty was illiterate, as indicated by the "x" marks made in the subscription, 10 Stat. at 1061-2; and (b) the Indian Claims Commission's description of the "negotiations" leading to the Treaty illustrates the shameful advantage taken of these Shawnees, capped by the Commission's determination that the major aspect of this treaty, *i.e.*, the consideration paid the Shawnees, was "unconscionable", 6 I.C.C. Dec. 377 (1958), at 394. In view of these, the Court of Appeals' judgment as to what it concludes is the Indians' "intent" is inappropriate to say the least.

The four Supreme Court cases are directly in point. They hold that where the United States is ceded and holds title to later perform the ministerial act of conveyance, the Indians' title is not diminished. That is this case exactly. This Court should assure that its previous rulings must be followed.

4. The Court should construe former 43 U.S.C. § 1152, now repealed, so as to define what are "public lands", in that many titles may still be affected.

To save the clearly void patent, the Court of Appeals was required to rule the subject tract was "public lands", so as to shoe-horn the case within former 43 U.S.C. § 1152, now repealed. Its exercise in doing so is far from being either intellectually or legally satisfying. We try to detail in 1., of our Petition for Rehearing, App. A18-23, the disturbing manner in which it was achieved and just how mistaken it was.

The original reasons for the statute are evident. The common law provided a patent to a dead man was void. The mischief which § 1152 was designed to remedy was time and space. In the first third of the 19th century, settlers in remote sections of the country might meet the requirements of various laws so as to become entitled to receive a patent to land they had settled. But the patents were issued in far-away Washington, which could only be communicated with by slow, cumbersome means. It frequently happened that while the painful process of getting a patent issued was unfolding, the person entitled to the patent would die so that when the patent was issued, the patentee would be dead, unbeknownst to the issuer.

The remedy afforded by § 1152 was to validate that patent, making it valid even though the patentee, provided he was entitled to the land, might be deceased. The statute specifically limited the remedy to "public lands".

Although the statute itself has been repealed, its effect is lasting enough to throw doubt on a considerable

number of titles. For example, in this case, respondent's Attorney General has pointed out that a ruling on the 11.97 acres in issue directly affects title to the remainder of the three sections "set apart" in Art. 2 of the 1854 treaty.

Although the Court has been called upon to interpret "public lands" in respect to other statutes, and in other contexts, it has not ruled on its meaning within the context of this statute. It is a significant deficiency in statutory interpretation of federal land law, which may affect not only titles derived from Indian lands, but titles derived from the Homestead and Allotment acts as well. Such deficiency should be remedied by granting certiorari and deciding this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ALVIN D. SHAPIRO*
LAW OFFICE OF ALVIN D. SHAPIRO
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824
Attorney for Petitioner
*Counsel of Record

Of Counsel:

KEITH WILSON, JR.
201 W. Lexington
Independence, Missouri 64050
(816) 252-1000

WILLIAM V. MCLEESE
14400 E. 42nd St.
Independence, Missouri 64050
(816) 373-8262

March, 1989

APPENDIX

(Filed December 2, 1988)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2600

THE ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, DANIEL LITTLE AXE, GOVERNOR,
Plaintiff-Appellant,

v.

THE STATE OF KANSAS,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS,
(D.C. No. 84-2435-S)

Before McKAY, TACHA, and BRORBY, Circuit Judges.

TACHA, Circuit Judge.

The Absentee Shawnee Tribe of Indians of Oklahoma (Shawnees) appeal an order of summary judgment denying their claim to certain property located in Johnson County, Kansas. The issue on appeal is whether the Shawnees have superior title to this property under an 1854 treaty with the United States. We hold that they do not, and affirm.

The Shawnees seek possession and title to 11.97 acres of land located in Johnson County, Kansas, and known

as the Shawnee Mission State Park. The State of Kansas (State), the current titleholder, derives its title to this land from a patent issued to the Rev. Thomas Johnson by the United States government in 1865. Prior to the issuance of the patent, the property in dispute was part of three sections of land granted to the Missionary Society of the Methodist Episcopal Church South in an 1854 treaty between the Shawnees and the United States. Treaty with the Shawnees, May 10-Sept. 28, 1854, United States-Shawnees, 10 Stat. 1053 [hereinafter 1854 Treaty].

The Shawnees contend that the patent through which the State claims title to the property is invalid because the Rev. Johnson, the original patentee, was dead at the time the patent was issued. At common law, a land patent to a deceased person is void. *Davenport v. Lamb,* 80 U.S. (13 Wall.) 418, 427 (1871). The Shawnees argue that, because of the invalidity of the patent, the 1854 Treaty makes them the rightful title holders of the property.

The district court granted summary judgment in favor of the State on the grounds that former 43 U.S.C. § 1152 (repealed October 21, 1976), a remedial statute in effect from 1836 to 1976, applied in this case to validate the patent to the Rev. Johnson. *Absentee Shawnee Tribe of Indians v. Kansas,* 628 F. Supp. 1112, 1117 (D. Kan. 1985). This statute provided:

> Where patents for *public lands* have been or may be issued, in pursuance of any law of the United States, to a person who has died before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

43 U.S.C. § 1152 (emphasis added). The district court rejected the Shawnees' argument that the statute was inapplicable to this case because the land in question was "Indian land," rather than "public land," under the terms of the 1854 Treaty. The Shawnees claim on appeal that the district court erred in this respect.

When reviewing a grant of summary judgment, we determine whether any genuine issue of material fact remains, and if not, whether the district court correctly applied the law. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986). The parties do not dispute that the Rev. Johnson, the original patentee, died prior to the date the patent was issued. The dispute in this case is whether now-repealed 43 U.S.C. § 1152 operated to remove the patent from the normal common-law rule of invalidity, thereby validating the patent and preserving title in the State. The question presented here, therefore, is one of law: whether the disputed property constitutes "public land" under the remedial statute. We employ a de novo standard of review of this legal issue. *Carey v. United States Postal Serv.*, 812 F.2d 621, 623 (10th Cir. 1987).

I.

The meaning generally ascribed to "public lands" is "well settled." *Union Pac. R.R. v. Harris*, 215 U.S. 386, 388 (1910).

> "The words 'public lands' are habitually used in our legislation to describe such as are *subject to sale or other disposal under general laws.*" If it is claimed in any given case that they are used in a different meaning, it should be apparent either from the context or from the circumstances attending the legislation.

Id. (citations omitted) (emphasis added) (quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875)). This meaning is consistent with the usage Congress intended in the remedial statute. *See Larkin v. Paugh*, 276 U.S. 431, 438 (1928).

In order to determine whether the disputed property in this case is "public land," we must interpret the 1854 Treaty, which established a reservation for the Shawnees. We are not confronted with construing an act of Congress that opens Indian lands to settlement by non-Indians. The difference between interpreting a treaty and an act of Congress in this context is important. When interpreting a statute, Congress' intent as expressed in the statute is determinative. When interpreting a treaty, the intention of the Indians and the intention of the government are both considered.

"A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979).[1] The Supreme Court has declared, however, that the Indians are not sovereign foreign nations in the truest sense of that term, but "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). "[T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else." *Id.* at 16. "Their relation to the United States resembles that of a ward to his

---

1. The modification of *Washington State Commercial Passenger Fishing Vessel Association* pertained only to footnote 16 of that opinion. *See Washington v. United States*, 444 U.S. 816 (1979) (mem.). Footnote 16 is not germane to this court's use of that case.

guardian." *Id.* at 17; *see also Choctaw Nation v. United States,* 119 U.S. 1, 27 (1886). The dependent status of Indians has in some circumstances resulted in treaties being forced upon them without their consent. *See Choctaw Nation v. Oklahoma,* 397 U.S. 620, 630-31 (1970). The Supreme Court has noted, however, in regard to Indian treaties that "[w]hen the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length." *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. at 675. The terms of the treaty in this case were the product of at least some negotiation.[2] "Accordingly, it is the intention of *the parties,* and *not solely that of the superior side,* that must control any attempt to interpret the treaties." *Id.* (emphasis added).

With regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation. *See, e.g., Solem v. Bartlett,* 465 U.S. 463, 470

---

2. In 1958, the Indian Claims Commission discussed the historical background of the 1854 Treaty. *Absentee Shawnee Tribe of Oklahoma,* 6 Ind. Cl. Comm'n Dec. 377 (June 19, 1958). By an act of Congress, the President was authorized to negotiate with the Shawnees for the purpose of " 'securing the assent of said tribes to the settlement of the citizens of the United States upon the lands claimed by said Indians, and for the purpose of extinguishing the title of said Indians in whole or in part to said lands.' " *Id.* at 379 (quoting Act of March 3, 1853, ch. 104, 10 Stat. 226, 238). The Commissioner of Indian Affairs visited the lands reserved to the Shawnees in 1853, and met with a council of Shawnees. *Id.* at 379-80. The Commissioner returned to Washington, reporting that the Shawnees, " 'as their only reply, proposed to sell the United States one million of [sic] acres, reserving to themselves six hundred thousand (600,000) acres adjoining the State of Missouri.' " *Id.* at 380. The Shawnee's tribal delegation pursued further negotiations in Washington over a two-week period in 1854. *Id.* at 380-81. The tribe and the Commissioner considered several different options and finally settled on the terms stated in the 1854 Treaty. *See id.*

(1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *Ute Indian Tribe v. Utah*, 773 F.2d 1087, 1088 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 596 (1986). Although it was once thought that Indian consent was necessary to diminish a reservation, it has long been held that Congress has the power to diminish reservations unilaterally. *Solem*, 465 U.S. at 470 n.11 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)). The "traditional solicitude for the Indian tribes," however, precludes the courts from diminishing Indian lands without "substantial and compelling evidence of a Congressional intention" to exercise its power to diminish Indian lands. *Id.* at 472. As a general rule, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem*, 465 U.S. at 470. "Diminishment . . . will not be lightly inferred." *Id.* Instead, "Congress [must] clearly evince an 'intent . . . to change . . . boundaries' before diminishment will be found." *Id.* (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. at 615).

The diminishment policy recognizes the fact that the terms of an act of Congress are often unilaterally imposed, rather than the product of negotiation between the Indians and the United States. Congress possesses the power to abrogate the terms of a treaty, "though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Although the Indians might theoretically have been represented in Con-

gress, the character of that representation is obviously different from having direct representation on one side of the negotiating table, and thereby having the opportunity to shape the specific terms or correct an ambiguous term of a treaty.

Treaties, being the product of joint agreement, do not implicate the diminishment policy expressed in *Solem*. We nevertheless afford similar protections to the interests of Indians through adopting deferential standards when interpreting treaties. The Supreme Court has held that "the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 675-76. We therefore interpret the 1854 Treaty in light of the Supreme Court's admonition that "enlarged rules of construction are adopted in reference to Indian treaties." *Kansas Indians*, 72 U.S. (5 Wall.) 737, 760 (1866). Indian treaties must be construed "so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.'" *Choctaw Nation of Indians v. United States*, 318 U.S. 423, 432 (1943) (quoting *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942)); *see also Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. at 676; *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in

the latter sense." *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 582 (1832) (Marshall, C.J.); *see also Choctaw Nation v. United States,* 119 U.S. at 28; *Kansas Indians,* 72 U.S. (5 Wall.) at 760. Ambiguous provisions are to be construed to the benefit of the Indians. *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). Courts may not, however, "ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Oregon Dept. of Fish & Wildlife v. Klamath Indian Tribe,* 473 U.S. 753, 774 (1985) (quoting *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. at 675).

With this interpretational framework in mind, we turn to examine the terms of the 1854 Treaty.

II.

An overview of the historical context of the 1854 Treaty is helpful to understanding the character of the land in dispute in this case. The Shawnees held 1.6 million acres of land in which is now the State of Kansas pursuant to an 1825 treaty with the United States. *Kansas Indians,* 72 U.S. (5 Wall.) at 738. The combination of the "advancing tide of civilization," and the dwindling number of Shawnees, gave rise to the 1854 Treaty, which reduced the territorial limits of the Shawnee reservation. *Id.* at 753. "By this [1854] treaty the united Shawnee nation ceded to the United States all the large domain granted to them by the treaty of 1825. In consideration for this cession, two hundred thousand acres of these same lands were receded to them, and they also obtained annuities and other property." *Id.*

The Supreme Court has noted that the 1854 Treaty was "peculiar in some of its provisions." *Id.* In particular,

despite the fact that the Treaty provides that the United States "cedes" 200,000 acres to the Shawnees, "[the 1854 Treaty] did not contemplate that the Indians should enjoy the whole [200,000 acre] tract." *Id.* Most relevant to the present case is the fact that the Shawnees were not to possess certain properties set apart for missionary organizations. Article 2 of the Treaty provides that "there shall *first be set apart* [from the 200,000 acre tract] to the Missionary Society of the Methodist Episcopal Church South, to include the improvements of the Indian Manual Labor School, three sections of land." 1854 Treaty, art. 2, 10 Stat. 1053, 1054 (emphasis added). The Treaty limits the Shawnees' initial choice of land to lands other than the property reserved to the mission. Article 2 provides that each Shawnee "shall be entitled to, *out of the residue* of said two hundred thousand acres, if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family." *Id.* (emphasis added). The "residue" in this context is clearly that portion of the 200,000 acres remaining *after* there was "first set apart" lands to the Missionary Society and other missionary groups.

The property in dispute in this case is part of three sections of land that was "first . . . set apart" to the Missionary Society of the Methodist Episcopal Church South in article 2 of the Treaty. *Id.* Article 6 of the Treaty defines the conditions of the grant to the Missionary Society:

> The grant to the Missionary Society of the Methodist Episcopal Church South, at the Indian Manual Labor School, shall be confirmed to said Society, or to such person or persons as may be designated by it, by patent, from the President of the United States, upon the allowance to the Shawnees, by said society, of

> ten thousand dollars, to be applied to the education of their youth; which it has agreed to make.

Id., art. 6, 10 Stat. 1053, 1056. We find that articles 2 and 6 unambiguously contemplate a sale of the mission property to the Missionary Society or its designee for consideration of $10,000. The mission property therefore satisfies the definition of public lands by being "subject to sale or other disposal under general laws." *Union Pac. R.R.*, 215 U.S. at 388.

Furthermore, article 2 expressly provides that "the said Indians hereby cede, relinquish, and convey to the United States, all tracts or parcels of land which *may be sold, or are required to be sold* in pursuance of any article of this instrument." 1854 Treaty, art. 2, 10 Stat. 1053, 1056 (emphasis added). The mission property was therefore receded to the United States, which held title until payment of the $10,000 specified by the Treaty. The fact that the property was receded to the United States pursuant to article 2 also supports the conclusion that the property was "public land," rather than Shawnee land, because the United States held title to the property.[3]

III.

The Shawnees attempt to avoid this construction of the Treaty and the conclusion which follows—that the disputed mission property is "public land"—by arguing

---

3. In determining congressional intent to diminish Indian land, the *Solem* Court found critical the facts that (1) the act in question made explicit reference to *cession* of the land; and (2) Congress made an unconditional commitment to compensate the Indian tribe for the land. The Court held that when this is the case "there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished." *Solem*, 465 U.S. at 470-71. Although diminishment concerns are not implicated in this case, we find these same factors persuasive here in interpreting the intent of both the Indians and Congress.

that the Treaty merely authorizes the United States to act as the Shawnees' sales agent in disposing of the property. They contend that the treaty provisions in this case, like the surplus land acts discussed in diminishment cases such as *Solem,* "'did no more than to open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards.'" *Solem,* 465 U.S. at 473 (quoting *Seymour v. Superintendent,* 368 U.S. 351, 356 (1962)).

As stated by the Supreme Court, "[w]hether or not the government became trustee for the Indians or acquired an unrestricted title by the cession of their lands, *depends in each case upon the terms of the agreement or treaty by which the cession was made.*" *Ash Sheep Co. v. United States,* 252 U.S. 159, 164 (1920) (citations omitted) (emphasis added). The Shawnees admittedly have some support for their position in the literal language of the Treaty. Article 2 provides that "[a]ll the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundred thousand acres *reserved* by the Shawnees." 1854 Treaty, art. 2, 10 Stat. 1053, 1054. By construing the term "reserved" in its technical sense, there is an argument that all of the land was Indian land, including the mission property, and that the United States was merely the agent of the Indians in selling the property. Reading the Treaty as a whole, however, and interpreting the terms as they would have been understood by the Indians, we nevertheless conclude that the United States was not merely the agent of the Indians.

First, the use of the term "reserved" in this context is highly suspect given the fact that the first sentence of article 2 had originally contained the term "reserved," but was subsequently amended to omit that term. *Id.*, amendments, 10 Stat. 1053, 1059. In the original draft of the Treaty, the Shawnees were to have reserved the 200,000 acre tract out of the 1.6 million acres they ceded to the United States. Instead, the Shawnees ceded the entire 1.6 million acre tract to the United States, and the United States receded two hundred thousand acres to them.[4] Article 2's original provision referring to the land within the boundaries defined in article 1, "[t]he two hundred thousand acres of land reserved by the Shawnees," was therefore amended to read "[t]he United States hereby cede to the Shawnee Indians two hundred thousand acres of land to be selected between [specified boundaries]." *Id.*, art. 2, 10 Stat. 1053, 1054; *id.*, amendments, 10 Stat. 1053, 1059. In this context, therefore, the term "reserved" is merely a means of describing the two hundred thousand acres of land in which they would have the right to select property, and it does not necessarily indicate that the Shawnees understood that all of the land was, and would always be, "Indian land."

Second, the historical record indicates that the Shawnees understood that the Treaty entitled the Rev. Johnson to the property under the Treaty, and that they intended him to have it. When another treaty was pending in the Senate in 1864, which would have required the mission property to be sold because the Missionary Society had not fulfilled the terms of the 1854 Treaty

---

4. As discussed above, the term "cession" was not understood to have provided full rights of title in all of the lands within the specified boundaries, but only in the lands which they would eventually select under article 2.

and had breached the terms of an 1855 contract by which the Missionary Society was to provide educational services to the Shawnees, the Shawnees petitioned the Commissioner of Indian Affairs to use his influence to prevent the sale. Their reasons stated in the petition were as follows:

> 1*st* Because said sale would be in conflict with and in violation of vested rights acquired under the stipulations of certain contract made by virtue of the authority of said 6th Section of the treaty of 1854 by the Commissioner of Indian Affairs with the Missionary Society of the Methodist Episcopal Church—
>
> 2*nd* Because we as a tribe desire to act in good faith towards said church or its assigns believing that said church has to the best of its ability fulfilled its part of said contract
>
> 3*d* Should the said land be sold as provided in said treaty, Thomas Johnson would be the sufferer. Mr. Johnson has Spent near 26 years of the prime of his life in teaching us and our children: 18 years of which was without pay from us or the United States
>
> 4*th* It was the wish and intention of our tribe at the time of making said treaty of 1854 to give Said Johnson said three Sections of land
>
> 5*th* We did not desire the insertion of Said clause in said treaty of 1864 but were advised contrary to our wishes to assent thereto—
>
> 6*th* We do not believe that said lands would sell for a sum sufficient to pay for the improvements

> made by said church upon said land, thereby leaving the tribe in debt.

Letter from Chiefs and Council of the Shawnee Tribe of Indians to William P. Dole, Commissioner of Indian Affairs (January 17, 1865) (original handwritten). The letter requested that the government resolve its dispute with the mission by settling any balance found due on the mission property out of the debt the government owed to Johnson. *See id.* This letter supports the conclusion that the Shawnees were fully cognizant of the effect of the 1854 Treaty in divesting their rights in the mission property. Even after the mission had discontinued providing educational services, the Shawnees clearly did not contemplate that they had any continued claim in the property. This is a case in which we cannot "ignore plain language that, viewed in historical context and given a 'fair appraisal,' clearly runs counter to a tribe's later claims." *Klamath Indian Tribe,* 473 U.S. at 774 (quoting *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. at 675).

Any further doubt about the invalidity of the Shawnees' agency argument has been dispelled by the Supreme Court's interpretation of the 1854 Treaty, in *Walker v. Henshaw,* 83 U.S. (16 Wall.) 436 (1872). The Court in *Walker* held that the Shawnees essentially held equitable title in all unselected lands *capable of being claimed by a tribal member* until the land was opened to settlement by non-Shawnees in accordance with the terms of the Treaty:

> [U]ntil the privilege [of selecting their lands within the limits of the reservation] was exhausted, the land, in any proper sense, belonged to them. In surrendering the larger part of their immense possessions to

> relieve the government from the predicament in which it was placed by the advancing tide of white population, they did not part with any right in the lesser part reserved by them as long as the claim of any single member of the tribe, according to the terms of the treaty, was unsatisfied.

Id. at 443. Article 2 essentially gives the Shawnees five years to select their lands, and provides for the sale of unselected lands, with the proceeds applied to their benefit. 1854 Treaty, art. 2, 10 Stat. 1053, 1055. Article 5 protects this right of selection by providing that "no white persons or citizens shall be permitted to make locations or settlements within [the 200,000 acre tract], until after all of the lands shall have been surveyed, and the Shawnees shall have made their selections and locations, and *the President shall have set apart the surplus.*"[5] *Id.*, art. 5, 10 Stat. 1053, 1056 (emphasis added).

The President's proclamation of July 9, 1858, opened unclaimed lands to settlement by non-Shawnees and extinguished the Shawnees' rights in land unclaimed by members of their tribe. *See Walker,* 83 U.S. (16 Wall.)

---

5. With regard to surveyance, article 5 states that the lands within the defined boundaries "shall be surveyed, *in the same manner as the public lands of the United States are surveyed.*" 1854 Treaty, art. 5, 10 Stat. 1053, 1056 (emphasis added). The Shawnees argue that by using the terms "in the same manner as public lands," the Treaty implicitly recognizes that only nonpublic or Indian lands will be surveyed. Even if we accept the argument that the Treaty would not use the terms "same manner as public lands" if it were not referring to nonpublic lands, our construction of the Treaty does not deny that there are nonpublic lands, as well as public lands, within the area defined in article 1. As the later case of *Kansas Indians* demonstrates, the lands that the Shawnees selected and continued to own were held to be Indian lands which were exempt from taxation. *Kansas Indians,* 72 U.S. (5 Wall.) at 760-61. Simply because some of the land to be surveyed constituted Indian land, does not support the proposition that all of the lands were Indian land.

at 445-46. When the President set apart the lands unclaimed by the Shawnees and opened such lands to preemption and settlement pursuant to articles 2 and 5 of the 1854 Treaty, such lands were "declared to be *public lands.*" *Id.* at 446 (emphasis added).

Although *Walker* did not specifically involve the disputed mission land in this case, the Court's holding that the Shawnees' rights in the unclaimed land prevented non-Shawnees from obtaining title "*until* the proclamation of the President of the 9th of July, 1858," *id.* at 445 (emphasis added), has significant implications for this case. By noting that the Presidential proclamation "declared [lands unclaimed by the Shawnees] to be public lands", *id.* at 446, the Court dispelled any implication that the United States was merely an agent of the Shawnees and that the Indian character of the lands remained intact after the sale. *Cf. Ash Sheep*, 252 U.S. at 166 (finding agency relationship when treaty explicitly stated, "the United States shall act as trustee for said Indians"). On the contrary, the Presidential proclamation of July 9, 1858, effectively extinguished an equitable title that the Shawnees held in land not previously selected by a Shawnee. After each Shawnee had received his or her two hundred acre entitlement,[6] the Treaty clearly allowed

---

6. The Treaty provided that a Shawnee who was a "single person" was entitled to 200 acres, while a Shawnee who was a "head of a family" was entitled to 200 acres "for each member of his or her family." The Treaty further provided that the land to which these Shawnees were entitled should "include, in every case, the improvement on which such person or family now resides; and if two or more persons or families occupy the same improvement, or occupy different improvements in such close proximity, that all of such persons or families cannot have the quantity of land (to include their respective improvements) which they are entitled to, and if in such cases the parties should be unable to make an amicable

(Continued on following page)

unclaimed land to be sold to non-Shawnees. Articles 2 and 6 of the Treaty limited the Shawnees' rights regarding lands to be sold to having payments for such land applied to their benefit. 1854 Treaty, art. 2, 10 Stat. 1053, 1054; *id.*, art. 6, 10 Stat. 1053, 1056. The parties do not dispute that such payments were made with regard to the mission property.[7]

The terms of the Treaty, therefore, were understood by both parties to contemplate that the mission property was "public land," and not land that was "reserved" to the Shawnees as Indian land in a technical sense. The mission property was not selected by the Shawnees under article 2 of the Treaty. On the contrary, article 2 restricts their choice of land to the "residue" left after the grant to the missionary groups. *Walker* limits the Shawnees' rights to the property they actually claimed under the Treaty, and the mission property, falling outside that category, is "public land."

The remedial statute applies in this case to validate the patent issued posthumously to the Rev. Johnson, and we uphold the State's title to the property. The district court's grant of summary judgment in favor of the State is therefore AFFIRMED.

Footnote continued—

agreement among themselves, the oldest occupant or settler shall have the right to locate his tract so as to include said improvements, and the others must make a selection elsewhere, adjoining some Shawnee settlement." 1854 Treaty, art. 2, 10 Stat. 1053, 1054.

7. The historical record indicates that the Shawnees received $10,000 as promised in the Treaty. The Missionary Society liquidated $8,000 of the debt by performing educational services pursuant to a contract with the Commissioner of Indian Affairs. The balance was paid by the Rev. Johnson's estate through a setoff of $2,000 from a $7,500 debt owed to the estate by the United States.

(Filed December 15, 1988)

(Title Omitted in Printing)

PETITION FOR REHEARING, AND SUGGESTION FOR REHEARING EN BANC

Plaintiff-appellant, the Absentee Shawnee Tribe of Indians of Oklahoma, herewith petitions the Court for a rehearing, pursuant to Rule 40, F.R.App.P., and Tenth Circuit Rule 40; or, in the alternative, makes to the Court its Suggestion for En Banc Consideration, pursuant to Rule 35, F.R.App.P., and Tenth Circuit Rule 35. The Court overlooked or misinterpreted the following:

1. The Court's Own Reasoning Is Contrary To Its Decision; This Was Not "Public Land," Nor Was It Subject To Sale "Under General Laws."

The Court decides this land was "set apart" to the Methodists for specific purposes of educating the Indians for a continuing time (despite its being "reserved" by the Indians; see 2., *infra*). Only upon this identified group performing this specific purpose to benefit the Indians (as well as pay compensation), which the Court indicates was not accomplished, see p. 14, Court's opinion, was the President authorized to convey title to it, Art. 6. The Court's own decision holds this specific purpose was to be accomplished not by the general public but by an identified group. Its disposition was *only* to be in accord with the performance of specific purposes by such identified group. Despite this, the Court concludes this was "under general laws" so as to be "public land".

If anything is clear from the Court's decision, the one thing this land most assuredly was *not*, was subject

to sale "under general laws". When Rev. Johnson was murdered in January, 1865, and a patent subsequently issued to him by the President in April, 1865, the land in issue had long since lost any characteristic it might ever have had as "public land" subject to be sold under "general laws." This by the Court's own reasoning.

Nor does it fit any definition of "public land", see below.

The hornbook definition of "general law" is:

> A law that affects the community at large. A general law as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. A law that relates to a subject of a general nature, or that affects all people of state, or all of a particular class, while one relating to particular persons or things of a class is a "special law". Albuquerque Metropolitan Arroyo Flood Control Authority v. Swinburne, 74 N.M. 487, 394 P.2d, 1000.

Black's Law Dict., (5th Ed.), at 616. In no sense could it be said the land in question was subject to disposal under "general laws", as this Court's own opinion—indeed, its very reasoning—recognizes. "Public land" excludes lands held for any special purposes, *U.S. v. Garretson*, 42 F. 22, 24 (D. Ala. 1890). It does not include

land held by the government for prescribed purposes, see, *e.g., Western Nuclear, Inc. v. Andrus,* 664 F.2d 234, 237 (10th Cir. 1981), rev'd on other grounds, 462 U.S. 36 (1983); *U.S. v. Schwarz,* 460 F.2d 1365, 1372 (7th Cir. 1972) [cannot be "public land" where cannot be alienated without express consent of the President, *id.*, at 1372]. There are no Homestead or Allotment acts involved here.

In concluding this land was "public land", the Court clearly overlooked or misinterpreted what are "general laws". Indeed, its own opinion is to the opposite effect, *i.e.*, no "general laws" were involved so as to make this "public land".

Equally important, what is there "public" about this land so as to fulfill former 43 U.S.C. § 1152's initial requirement that it be "public land"? Neither of the two entities involved—*i.e.*, neither supposed transferor nor supposed transferee—was "public". In the treaty, it is "set apart" by the Indians (certainly *not* a "public" body) to the Methodists (also not a "public" body). And for a distinctly non-public purpose. The only aspect of this that could possibly be deemed "public" is the United States is given title to hold so that under Art. 6, the President can convey when the Methodists have performed. But the U.S. Supreme Court has repeatedly held in the four cases discussed in *4., infra* (which cases we believe the Court fails to follow), the fact that the government holds title either in trust or to perform the ministerial act of conveying is not enough to diminish the Indians' title.

In this last respect, we feel ourselves constrained to call the Court's attention to then-Justice Rehnquist's statements in *Rosebud Sioux Tribe v. Kneip,* 430 U.S.

584 (1977), at 601, fns. 23 and 24. He refers therein to two of the Supreme Court cases we feel this Court disregarded, see 4., *infra*. They are *Minnesota v. Hitchcock*, 185 U.S. 373 (1901), and *Ash Sheep Co. v. U.S.*, 252 U.S. 159 (1919). Justice Rehnquist states lands admittedly "ceded" in *Hitchcock* were precluded from becoming "public lands" because a trust imposed upon them had given them a preceding status. However, he notes the Eighth Circuit Court of Appeals had indicated in *Rosebud* that retaining a beneficial interest does not necessarily erode the cession. He then states the question of whether the *Rosebud* lands became "public lands" under *Hitchcock* and *Ash Sheep* was not there before the Supreme Court and did not there need to be ruled. Here, such question must be ruled for the Indians.

From the many, varied items included in the Court's opinion to justify its decision, the Court appears to have lost sight of the only material issue: Was this otherwise invalid patent of 1865 made valid by now-repealed 43 U.S.C. § 1152? For a patent to be rendered valid by that statute, it had to be "public land" issued pursuant to a law of the United States. "Public land" is defined as being land which is subject to sale or disposition "under general laws".

The statute was clearly enacted to apply to such "general laws" as the various Homestead or Allotment acts, none of them in issue here. The Court's own decision, by repeated references to the "setting apart" by one non-public body to another non-public body, for specific non-public purposes, makes it clear this was neither "public land" nor "under general laws". If it was ever "public land" (and it was not), it had long since lost any such characteristic when the attempted convey-

ance was made in 1865. While it may be academically intriguing to speculate whether § 1152's use of "public land" was meant to refer to this land's character in 1854, the time of the treaty, or in 1865, the time of the conveyance, it is here clear this land *never* had any such status. It belonged to the Indians when they supposedly set it apart in 1854 (remembering they specifically said they "reserved" it as part of their 200,000 acres), and had certainly lost all such character in 1865.

Among the other miscellany relied on by the Court is its conclusion, at pp. 10-11, Court's opinion, that Arts. 2 and 6 contemplate a sale, and "therefore" the definition of being "subject to sale . . . under general laws" is satisfied. What "general laws" is the Court talking about? There are none, and the Court mentions none.

The Court later appears to abandon this conclusion, at pp. 15-18, Court's opinion, by citing *Walker v. Hinshaw* and a 1858 presidential proclamation mentioned therein. The thrust of this argument seems to be the land here in issue is somehow deemed part of the 200,000 acres *not* selected by the individual Indians, and is thus "public land". But again, the Court's decision itself repeatedly holds this land was *not* part of the 200,000 acres at all, since, the Court holds, it had been "first . . . set apart", see p. 10, Court's opinion.

Actually, the Court's use of *Walker* is totally inapposite. First, the Court concedes, at p. 17, "*Walker* did not specifically involve the disputed mission land in this case." Second, *Walker* and the 1858 presidential proclamation discussed therein, dealt with lands in no way relevant to this land in that they were subject to completely different Treaty provisions. Finally, and most importantly, this Court states the land here in issue was

"set apart" for a specific purpose, with a specific provision for its conveyance upon a specific event or condition, all expressly set forth in Art. 6 ("The grant to the Missionary Society . . . shall be confirmed . . . by patent, from the President . . . upon the allowance to the Shawnees . . ."). Neither *Walker* nor the 1858 proclamation is relevant to this specific property and the express provision governing it.

2. Despite Lip Service To Principles of Construction Favoring the Indians, The Court Construes Every Factor Against—Not For—The Indians.

The U.S. Supreme Court, from Chief Justice Marshall to the present, has always enjoined federal courts, in construing treaties and legislation involving Indian rights, to attempt to rectify the shameful treatment of the Indians—basically illiterate and untrained in the white man's law—by using liberal construction in favor of the Indians. This benign principle is based on belated recognition of an obligation to compensate for the often brutal treatment and advantage taken of basically defenseless, outnumbered Indians. In *Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), Justice Powell stated:

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, Choctaw Nation v. United States, 318 U.S. 423, 431-432 (1943); Choate v. Trapp, 224 U.S. 665, 675, (1912), with ambiguous provisions interpreted to their benefit, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174, (1973); Carpenter v. Shaw, 280 U.S. 363, 367, (1930);

> Winters v. United States, 207 U.S. 564, 576-577, (1908). "Absent explicit statutory language", Washington v. Washington State Commercial Passenger Fishing Vessel Assn. 443 U.S. 658, 690 (1979), this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. Menominee Tribe v. United States, 391 U.S. 404, (1968).

470 U.S. at 247. See also *Donovan v. Navajo Forest Prod. Inds.*, 692 F.2d 709 (10th Cir. 1982) ["[T]he full obligation of the United States to protect the interests of a dependent people . . . All doubtful expressions contained in Indian treaties should be resolved in the Indians' favor." *Id.*, at 712]. Despite paying lip service to this principle, this Court demonstrably uses all available devices to construe this Treaty (the major aspect of which has been described by the Indian Claims Commission as "unconscionable", see 3.(a), *infra*) against the Indians.

To cite just one—but most important—example: Although the Court concedes the key provision in issue (Art. 2) expressly states in plain language this very land is "reserved" by the Shawnees, as part of its 200,000 acres, at p. 12, Court's opinion, it states such express term is "highly suspect" because the first use of "reserved" in Art. 2 (but *not* this use) was amended to "cede". How or why such amendment makes this second use of "reserved" "highly suspect" is not explained. It is also indicated the Court will not construe "reserved" in its "technical sense," *ibid.* Again, this is left unexplained. Then, in justifying its rejection of this express term (*i.e.*, "reserved") so as to also justify its conclusion that "the United States was not the agent of the Indians," it omits to mention that Art. 6 (quoted at p. 10, Court's opinion) again provides the President of the United States is in-

deed both the trustee and the agent of the Indians. Finally, as if to leave no doubt that its lip service to the *Oneida* principle of construction is indeed just lip service, the Court dredges up, to disprove whatever it wishes to disprove about "reserved", the letter of January 17, 1865, (discussed at length in 3., *infra.*,), demonstrably irrelevant as well as patently unreliable to even the most casual observer.

At most, the provisions of Art. 2 ("cede", "set apart", "reserved") create an ambiguity. If so, the above-cited cases leave no doubt as to the Court's duty to construe or interpret any such ambiguity in favor of the Indians.

In interpreting a treaty between the United States and an Indian tribe, any doubts as to the ownership of lands reserved to the tribe should be resolved in favor of the tribe, *U.S. v. Shoshone Tribe*, 304 U.S. 111, 116-7 (1938). Here the Court strains to interpret the "intent" of the Indians, even citing a letter supposedly written by them eleven years later. But as this Court itself has stated, in construing a document, "intent" is not looked at unless the document is itself ambiguous, *Dipo v. Ringsby Truck Lines*, 282 F.2d 126, 130 (10th Cir. 1960). If the Treaty is indeed ambiguous, the Court is called on by *all* the authorities to interpret such ambiguity in favor of the Indians.

It is difficult to understand why the Court would go to such lengths to refute or evade the plain words of the Treaty, and thereby disregard the long-settled principle of liberal construction in favor of the Indians, a principle based on the historic and well-documented mistreatment of the Indians by the white man. This principle deserves more than lip service.

3. The Court's Reliance On The Letter of January 17, 1865, Written In The Name of the Shawnees, Is Misplaced.

To justify its decision, the Court places great stress on the letter of January 17, 1865, written in the name of the Shawnees, at pp. 14-15, Court's opinion. At least five reasons clearly demonstrate the Court's reliance on this letter is misplaced:

(a) *Eleven years after "unconscionable" treaty*: Patently, the letter was written some eleven years after the 1854 treaty—a treaty the main aspect of which was described as "unconscionable" by the Indian Claims Commission, *Absentee Shawnee Tribe of Oklahoma*, 6 *Ind. Cl. Comm'n Dec.* 377, at 394 (1958). The inappropriateness of attempting to divine the Indians' and the government's intent in 1854 from a letter written in 1865 is manifest.

(b) *Events after treaty immaterial to "intent"*: Except for the fourth paragraph, the letter concerns itself solely with events (or states of mind) which occurred (or existed) *after* 1854, and clearly have no relevance to the parties' intent in 1854. As for the fourth paragraph, the Shawnees have words put in their mouths to the effect that in 1854 they intended to give the property to Rev. Johnson. If such was actually their intent, nothing is clearer than the fact they did *not* do so—they "set apart" the land for the Methodist Missionary Society, not for Rev. Johnson. Whoever wrote the letter for the Shawnees forgot to check this out.

(c) *Two weeks after Johnson murdered*: Again patently, the letter is dated some two weeks after Rev. Johnson was shot. The verb tenses in the letter's third paragraph are to the effect that Rev. Johnson is still alive (a fair clue as to its real author). Its validity is more

than somewhat suspect. It is also surprising the Court could rely on so untrustworthy a document to support a supposed conveyance in a treaty the major aspect of which the Indian Claims Commission concluded was "unconscionable". See (a), *supra*.

(d) *Patently unreliable*: Placed in the Shawnees' mouths are sophisticated legal concepts such as "vested rights", "authority of said 6th Section," etc. This from Indians who were illiterate and signed their names with an "x". See, *e.g.*, 10 Stat, at 1061-2. It is again surprising the Court would not discern these obvious attributes of the letter's unreliability.

(e) *Johnson's actual record*: Despite the letter's glowing praise of Johnson, the Shawnees had good reason to think otherwise. Until the Court relied on this letter, we had thought this case presented strictly a legal issue. Now we are constrained to point out the pleadings below show a distinctly different aspect of Rev. Johnson. Appellee conceded below Johnson dealt in and took advantage of slave labor, and failed to fulfill the conditions under which the Methodists had entrusted this property to him; even the Court concedes the terms of the treaty in this respect had been breached and the required educational services had not been provided, see p. 14, Court's opinion. More importantly, the historical source relied on below by appellee, Martha B. Caldwell, *Annals of Shawnee Methodist Mission and Indian Manual Labor School*, 2d Ed., details the bitter complaints of the Shawnees, citing inadequate and inedible food, unsanitary and intolerable conditions at the school, directly leading to the deaths of a number of young Shawnees entrusted to Rev. Johnson's care—more results of what the ICC aptly described as a basically

"unconscionable" treaty. The Court clearly overlooked or misinterpreted the letter's untrustworthiness and inapplicability.

4. The Court's Decision Overlooks or Misinterprets Four Supreme Court Cases Which Require Reversal.

At least four Supreme Court cases here require a decision that even though the United States held title, whether as trustee or to perform the ministerial act of conveying title, such fact does *not* convert this land into "public land", or serve to diminish the Indians' title. The four cases are *Minnesota v. Hitchcock,* 185 U.S. 373 (1901); *Ash Sheep Co. v. U.S.,* 252 U.S. 159 (1919); *Seymour v. Superintendent,* 368 U.S. 351 (1962); and *Solem v. Bartlett,* 465 U.S. 463 (1984). See also *U.S. v. Shoshone Tribe,* 304 U.S. 311, 316 (1938). The Court attempts to distinguish these cases by saying they involve diminishment through construction of congressional enactments, rather than construction of a treaty, as involved here. This is a distinction without a difference.

All four cases recognize there is no diminishment of Indian title from the government holding title, as here, so as to perform the ministerial or trust act of conveying title. ("Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest". *U.S. v. Shoshone Tribe,* 304 U.S. at 116). The Court's attempt to distinguish *Seymour* and *Solem* is misplaced and of no real consequence.

As noted, the Court distinguishes these cases by saying they involve Congressional enactments, rather than a treaty, as here. Somewhat theoretically, it says, that in cases involving Congressional acts, the Indians

presumably bring no influence to bear, while in respect to treaties, the Indians are a party and their intent is to be examined in construing the treaty's provisions. Given two facts here, such conceits are grossly inappropriate when applied to this treaty: (a) Each of the Shawnees shown as assenting to the treaty was illiterate, as indicated by the "x" marks made in the subscription, 10 Stat. at 1061-2; and (b) the Indian Claims Commission's description of the "negotiations" leading to the Treaty illustrates the shameful advantage taken of these Shawnees, capped by the ICC's determination that the major aspect of this treaty, *i.e.*, the consideration paid the Shawnees, was "unconscionable", 6 I.C.C. 377 (1958), at 394. In view of these aspects, it is difficult to comprehend the Court's reliance on what it concludes is the Indians' "intent".

The above Supreme Court cases are in point. They indicate that where, as here, the United States holds title to later perform the act of conveyance, the Indians' title is not diminished. That is this case exactly. The Supreme Court cases should be followed.

5. Statement of Counsel Pursuant to Tenth Circuit Rule 35.2

(a) I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decisions of the United States Supreme Court, and of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

Minnesota v. Hitchcock, 185 U.S. 373 (1901)
Ash Sheep Co. v. U.S., 252 U.S. 159 (1919)

U.S. v. Shoshone Tribe, 304 U.S. 111 (1938)

Seymour v. Superintendent, 368 U.S. 351 (1962)

Solem v. Bartlett, 465 U.S. 463 (1984)

Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)

Dipo v. Ringsby Truck Lines, 282 F.2d 126 (10th Cir. 1960)

Western Nnclear, Inc. v. Andrus, 664 F.2d 234, (10th Cir. 1981) rev'd on other grounds, 462 U.S. 36 (1983)

Donovan v. Navajo Forest Prod. Inds., 692 F.2d 709 (10th Cir. 1982)

(b) I express a belief based on a reasoned and studied professional judgment that the panel decision/appeal involves one or more questions of exceptional importance:

(i) As pinpointed by Justice Rehnquist in *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977) at 601, fns. 23 and 24, whether this can be deemed "public land" solely because naked fee title was held by the United States, subject to preceding rights?

(ii) Whether this was "public land" subject to sale "under general laws", when the Court holds it was "set apart" by one non-public entity to another identified non-public entity, for a non-public purpose and never subject to any "general laws" at all, including any Homestead or Allotment acts?

(iii) What is the meaning of "reserved" by the Indians, as used in Art. 2 of the Treaty?

(iv) Is it appropriate to attempt to ascertain the parties' "intent" from a letter supposedly written by the Indians eleven years after the treaty?

(v) Whether or not the State of Kansas can retain title to land based on a conveyance to a dead man, clearly invalid under common law?

/s/ Alvin D. Shapiro
Attorney for Appellant

6. Conclusion

A grave injustice has been done. We recognize the Court's reluctance to disrupt the State of Kansas' title to this property. But this country has always been strong enough to concede when mistakes have been made, with resulting injustices. Its judicial system has been willing to undo those injustices. It is also a tribute to the judicial system that it recognizes that the days when the Shawnees signed "x's" to documents of substantial import are over; the courts recognize they are now entitled to rectification of the wrongs done them, even though stated to be in their own name and with their assent.

The Court clearly overlooked or misinterpreted the sum import of its decision. The mixture of erroneous miscellany employed by the Court to justify the unjustifiable should be reconsidered, whether by the panel or by the full court *en banc*.

Respectfully submitted,

Law Office of Alvin D. Shapiro
/s/ Alvin D. Shapiro
Alvin D. Shapiro
911 Main Street
2830 Commerce Tower
Kansas City, Missouri 64105
(816) 474-6824
Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify copies of the above and foregoing Petition For Rehearing, and Suggestion For Rehearing En Banc, were mailed, postage prepaid, this 14th day of December, 1988, to:

Robert T. Stephan
Attorney General
Kansas Judicial Center, 2nd Floor
Topeka, Kansas 66612
Attorney for Defendant-Appellee

/s/ Alvin D. Shapiro
Attorney for Appellant

DECEMBER 23, 1988.

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby and Honorable David M. Ebel, Circuit Judges.

No. 86-2600

THE ABSENTEE SHAWNEE TRIBE OF INDIANS OF OKLAHOMA, DANIEL LITTLE AXE, GOVERNOR,
Plaintiffs-Appellants,

vs.

THE STATE OF KANSAS,
Defendant-Appellee.

This matter comes on for consideration of plaintiffs-appellants' petition for rehearing, with suggestion for rehearing en banc in the captioned appeal.

Upon consideration of the merits of the petition for rehearing, the petition is denied by the panel to whom the case was submitted.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Fed.R.App.P. 35, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
Robert L. Hoecker
Clerk